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# Supreme Court of the United States.

OCTOBER TERM, 1924.

No. ~~397~~ 47

THE UNITED STATES OF AMERICA,
*Appellant,*

*vs.*

HOLT STATE BANK, DEPOSIT BANK OF WINONA, FEDERAL LAND BANK OF ST. PAUL, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR THE APPELLEES.

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### STATEMENT.

This is a suit in equity by the United States against the riparian owners of the lands on the shores of Mud Lake, in Marshall county, Minnesota, to quiet the title to what was formerly the bed of said lake.

The land involved is situated in townships 156 north, ranges 41 and 42 west of the fifth principal meridian. These townships were surveyed in 1892.

At that time Mud Lake was a large body of open water, with a depth from four to six feet, was regularly meandered and designated on the government plats as "Mud Lake."

These townships were a part of the Red Lake Chippewa Indian Reservation. By the act of January 14, 1889 (Chap. 24, 25 Stat., p. 642), congress authorized the acquisition of a relinquishment to the United States by those Indians of all their title and interest in and possession of this lake, and the lands surrounding it, and provided that the lands so relinquished should be surveyed by the United States and sold to settlers in accordance with the provisions of its homestead laws for $1.25 per acre, and that the proceeds of the sales should be placed in the treasury of the United States to the credit of the Chippewa Indians in Minnesota. Pursuant to this act the Chippewa Indians ceded and relinquished to the United States all their rights and interests in and to said lake and all of the lands surrounding it. In 1892 the lands were surveyed and on May 15, 1896, they were opened for settlement and entry under the said homestead laws (R. 15). In Judge Sanborn's opinion this date is erroneously given May 15, 1906 (R. 452). The defendants, or their grantors, filed upon the riparian lands of said lake. The usual government patents were issued to said entrymen in accordance with the homestead laws and said survey, and many of these patents were issued long before there was any thought of draining the lake, some as early as in the year 1904.

Most of the patents were without restrictions or reservations. A few of the later patents limited the grant to the land "lying outside of the established meander line of Mud Lake" (Exhibit "F," R. 269).

February 26th, 1910, the District Court of Marshall county, Minnesota, granted a petition for a public drainage ditch designating it as Judicial Ditch No. 11. This ditch was established pursuant to the drainage laws of the state of Minnesota and the United States government was in no way interested, or party thereto, except as the owner of certain unentered lands affected by said drainage proceedings.

This ditch was constructed through the lake with the result that the lake was eventually drained. The appropriations on the part of congress and other matters referred to in the statement of brief for appellant had nothing to do with these drainage proceedings, and has no bearing upon the issues in this case.

In 1913, the water having receded on account of said drainage, a suit was brought in the District Court of said Marshall county, by Albert Johnson, one of the riparian owners, against the other riparian owners for a partition of the bed of said lake, and establishing the boundary lines between the respective tracts. United States was a party to this suit. The papers were served upon the receiver of the Crookston land office, and correspondence was had with the department of interior by said receiver as to the advisability of filing an an-

swer and appearing in that case (Exhibit "X," R. 445).

Judgment was entered decreeing that the owners of the abutting lands were the owners of that portion of Mud Lake contiguous thereto and extending to the center thereof (Exhibit "Y" R. 445).

It seems that during the time that the drainage work was under way that the attention of the department of interior was called to this lake bottom, and the secretary of the interior requested the department of justice to render an opinion on the status of these lands. The facts submitted to the attorney general were erroneous, it being claimed that no patents had been issued to abutting lands and on June 19th, 1912, based on this erroneous statement of facts, an opinion was given admitting the law to be that conveyances of the United States are to be interpreted according to the law of the state and "would doubtless convey title to the land beneath the water" and yet held that the lands should be surveyed and disposed of for the benefit of the Indians. A survey was accordingly made in 1913. On February 19th, 1916, the department of interior issued a circular (Exhibit "E," R. 56), giving notice of the opening of these lands for homestead entries. The entrymen were warned of defendants' rights, as follows:

> "23. There are included in the schedule 4,929.64 acres in Mud Lake bottom, located in township 156 north, 41 and 42 west. These lands were surveyed for disposal under said act of January 14, 1889, for the benefit of the Chippewa Indians, pursuant to the opinion of

attorney general of June 19, 1912 (29 Op. 445), and in accordance with the opinion of the attorney general of February 15, 1915, settlers and entrymen for these lands are warned that there is a possibility of litigation with the patentees of lands surrounding said lake bottom, claiming as riparian owners" (R. 63).

In 1920 the United States brought this action to quiet the title to said lands alleging that "at the time said survey was made in 1892, the tract of land referred to in the plat as Mud Lake, was a large marsh, swamp or overflowed land, being largely covered with rushes and weeds, and water standing a large portion of the time on the said land to a depth not to exceed four and one-half feet, and the said tract of land, meandered as aforesaid, was only suitable to be drained and used for agricultural land, and the same, as a matter of fact, should have been surveyed at the time of the original survey in 1892, and was improperly and erroneously meandered" (R. 4).

The defendants answered denying the above and alleged that the lake when surveyed was not only an open body of water of sufficient depth requiring it to be meandered in accordance with the rules regulating government surveys, but that it was in fact a navigable lake. This was the issue tried.

The undisputed testimony shows that the lake covered an area of 4,929.64 acres. That it was an open body of water varying in depth from four to six feet (R. 419, 429). The field notes of the government survey (Exhibits "6" and "8," R. 446) give the average depth at four feet. Ten years after

the original survey was made the government surveyors again visited said lake to survey a couple of small islands and in the field notes of that survey (Exhibit "7," R. 446) say, "Mud Lake is shallow, from three to six feet deep. The lake has a great reputation as a shooting resort."

It has a well defined shore line (R. 378, 418, 427).

In many places it had a gravel and sand bottom (R. 320 and 338), also several sand bars (R. 319 and 350).

Two rivers draining a large territory emptied into the lake—Mud River and Little River (R. 393). See Exhibit "3," map of Marshall county.

The outlet to the lake was Mud Creek (R. 394).

No attempt was made by the government during the trial of this case to show that there had been any mistake or fraud in its surveys. No testimony was offered to substantiate the allegations that Mud Lake was a marsh or swamp. All of the witnesses for the government admitted that the lake was a large body of open water (R. 318, 334, 371, 386). Their entire testimony was directed to one or two seasons when it was unusually dry, by describing the conditions then existing, even then they admitted that small boats could be used.

> "Q. When it was dry what about the use of the boat on the lake?
>
> A. It wasn't very often it got so dry you couldn't go with a small boat" (R. 387).

Mud Lake was a great shooting resort and hunting was done on a commercial basis (R. 336 and 378).

Gasoline launches and row boats were used on the lake (R. 395). Merchandise for stores east of the lake were carried across said lake by boat (R. 394 and 431). Exhibit "9" (R. 446) shows one of the launches that made trips on said lake (R. 440).

Mr. Swenkeson, witness for the government, saw the lake first in 1894 and he testified on direct examination as follows:

> "Q. Describe the lake to us at that time.
>
> A. Well, just an open lake in 1894, as I remember it.
>
> Q. An open body of water was there?
>
> A. Yes, sir.
>
> Q. It was not covered with rushes or anything like that at that time?
>
> A. No" (R. 386).

This was two years after the survey.

Mr. Peterson, a witness for the defendants, who first heard about this lake, through the Indians, saw the lake before it was surveyed. He describes it as follows:

> "Q. What kind of a bed of water was it when you saw it?
>
> A. Well, it was a nice kind—that it was a good looking lake when we came there.
>
> Q. Weeds and rushes growing on the waters at that time?
>
> A. No" (R. 425).

The testimony as a whole clearly shows that the lake was similar to the other lakes in a prairie country and that it was capable of use for boating and that boats were extensively used by the people in the neighborhood and by hunters both for pleasure and commerce.

The District Court by decree entered March 3rd, 1922, found that the lake before it was drained was a navigable lake and dismissed the bill of complaint (R. 297). An appeal was taken to the Circuit Court of Appeals, where the action of the lower court was affirmed, holding that there was no error of law or mistake of fact in the finding that they were navigable waters according to the law of the state of Minnesota (R. 456). Opinion reported in Volume 294 Fed. Rep. 161.

## ARGUMENT.

### I.

### Mud Lake was a Navigable Lake, and the Rights of Riparian Proprietors is a Question to be Determined Entirely by the Law of Minnesota.

In the United States each state determines for itself the question of the ownership of the soil underlying its public waters. The United States government never owned the soil under public waters, and its patent to the shore land does not pass title to the land under the water. This belonged to the states, and if the riparian owner has acquired it at all it is by the favor or concession of the state. In Minnesota the title of the proprietor of abutting lands extends to low-water mark. The title to the soil under the waters below low-water is held by the state, not in the sense of ordinary absolute proprietorship, but in its sovereign governmental capacity, for common public use, and in trust for the people of the state, for public purposes for which they are adapted. This

rule applies to all public waters, lakes as well as streams.

*State v. Korrer*, 127 Minn. 60.
*Hardin v. Jordan*, 140 U. S. 371.

The division of waters into navigable and non-navigable is merely a method of dividing them into public and private, which is the more natural classification; and the definition or test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial public use, they are public waters.

*Lamprey v. State*, 52 Minn. 181.

Commercial navigation as contended for by appellant is not the test to be applied.

In the above case of *Lamprey v. State*, the court says:

> "Many, if not the most, of the meandered lakes of this state are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of

which cannot, perhaps be now even anticipated. When the colony of Massachusetts two hundred fifty years ago, reserved to public use her 'great ponds' probably only fishing and fowling were in mind; but, as is said in one case 'with the growth of the community and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise. *West Roxbury v. Stoddard,* 7 Allen 158.'

If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private waters, but, however that may be, we are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common law rule. When the waters of any of them have so far receded or dried up as are no longer capable of any beneficial use of the public, they are no longer public waters, and their former beds, under the principles already announced, would become the private property of the riparian owners."

It is not necessary that the water should be capable of commerce of pecuniary value. If a body of water is adapted for use for public purposes, it is a public or navigable water.

*State v. Korrer,* 127 Minn. 60.

In this case the court says:

> "Boating for pleasure is considered navigation, as well as boating for mere pecuniary profit. Navigability for pleasure is as sacred in the eye of the law as * * * navigability for other purposes,"

and cites

> *City of Grand Rapids v. Powers,* 89 Mich. 94, 50 N. W. 661.

In *Erickschen v. Sibley,* 142 Minn. 37, the court describes the lake under consideration in that case as follows:

> "It appears beyond dispute that Washington Lake is bounded by meander lines, has an area of about 600 acres, with well defined shores, having a height of several feet above the water in many places and receding substantially to the water level in other places; that it has a soft, muddy bottom; that the depth of its waters fluctuates to such an extent that there have been two or three occasions in the past 50 years when it has been dry, while at other seasons it has had a depth of six to ten feet. At the time of the trial in August, 1917, its depth varied from 2.7 feet a few rods out from its shores to 3.5 feet near its center, which was its maximum depth at that time. In 1907 its maximum depth was 5.5 feet. These depths were testified to by witnesses who had made and recorded actual measurements. The testimony fairly shows that the water is lower in mid-summer than in spring and fall, and that the water was at its normal stage in 1917. At least one-third of the surface of the lake was then overgrown with vegetation. The remainder appeared to be clear water with occa-

> sional clumps of reeds growing above the surface. Under the clear water area there was everywhere present a plant described by the witnesses as a moss or vine which came within six to twelve inches of the surface. The presence of this growth made rowing difficult and bathing out of the question, after the vegetation came to maturity in mid-summer. Fish are taken from the lake only by spearing. They are principally carp, suckers and other coarse fish. During the winters fish are speared through the ice. At all seasons they are taken chiefly at the outlet to the lake. The lake is frequented by wild ducks in the fall of the year. It appears to furnish them with feeding ground. Hunters come from the farms and villages in the vicinity and from distant cities during the shooting season. Numerous boats are on the lake then. A few are kept there constantly by farmers who live nearby. Ice is cut from the lake each winter chiefly to supply a creamery not far from it."

This lake does not begin to have the advantages found in Mud Lake. However the court held it was a navigable lake.

In deciding the case of the *United States v. Chandler Dunhar Company,* 229 U. S. 53, May 26th, 1913, this court said:

> "The technical title to the beds of navigable rivers of the United States is either in the state in which the rivers are situated or in the riparian owners, depending upon the local law."

Again in *St. Anthony Falls Water Power Company v. St. Paul Water Commission,* 168 U. S. 349, this court said:

> "The rights of riparian owners of land situated upon navigable rivers are to be measured by the rules and decisions of the courts of the state in which the land is situated whether it be one of the original states or a state admitted after the adoption of the constitution."

What are the rights of the riparian owners on lakes?

The rule in Minnesota is briefly stated in *Lamprey v. State*, 52 Minn. 182, as follows:

> "The same rules govern the rights of riparian owners on lakes or other still waters as govern the rights of riparian owners on streams. Hence, if a meandered lake is 'non-navigable' in fact, the patentee of the riparian land takes the fee to the center of the lake; but, if the lake is 'navigable' in fact, its waters and bed belong to the state, in its sovereign capacity, and the riparian patentee takes the fee only to the water line, but with all the rights incident to riparian ownership navigable waters, including the right to accretions or relictions formed in front of his land by the action or recession of the water."

This rule has been consistently adhered to by the Supreme Court of Minnesota.

The drainage laws of the state of Minnesota (Sec. 1, Chap. 230, G. L. 1905) provide that no meandered lake shall be drained except in cases where the lake is no longer capable of any beneficial public use and there is no question but that any one of the riparian owners, or any other taxpayer, could have objected to the drainage of Mud Lake, and the court would have been obliged to

dismiss the proceedings on the ground that it was a navigable lake.

*Madson v. Larson,* 117 Minn. 369.

But the lake having been drained, with the consent of the state and all persons interested, to whom does the lake bed belong?

The settled doctrine of the state of Minnesota is that the beds of dried-up lakes belong to the riparian owners.

*Lamprey v. State,* 52 Minn. 181, 18 L. R. A. 670.

*Shell v. Matteson,* 81 Minn. 38, 83 N. W. 491.

*State v. Korrer,* 127 Minn. 60, L. R. A., 1919, C. 139.

*State v. Nobles,* 146 Minn. 150.

> "The owners of the land bordering on the shore of a meandered non-navigable or dried-up lake own the bed of the lake in severalty. Their title extends to the center of the lake; the boundary lines of each abutting tract being fixed by extending, from the meander line on each side of the tract, lines converging to a point in the center of the lake."
>
> *Shell v. Matteson,* 81 Minn. 38, 83 N. W. 491.

The Minnesota statutes also recognize the rights of the abutting owners to the drained lake bottom.

Under the drainage law, meandered lakes, either navigable or non-navigable, may be drained, if there is no objection.

*General Statutes Minnesota* 1913, Sec. 5481.

The statutes also provide that the viewers shall report, among other things, "the number of acres

added to any tract, by any total or partial drainage of any meandered lake * * * and the location and value of such added land"

*Id.*, Sec. 5528.

The drainage law also provides for a division of the lake bottom among the abutting owners by the court when any lake has been drained.

*Id.*, Sec. 5531, last sentence.

When a patent is issued for land bounded by a lake or stream, the title to the land under the water passes from the government.

*Hardin v. Jordan*, 140 U. S. 371.

*Mitchell v. Small*, 140 U. S. 406.

*Lamprey v. State*, 52 Minn. 181.

Patents to the majority of the riparian lands were issued long before the drainage of the lake, and without reservations or restrictions, and as to the bed of the lake abutting these lands, it is clear that the government had no estate or interest whatever in or to such lands.

Counsel for the government makes the claim that Mud Lake was not navigable and hence should never have been meandered. Assuming for the sake of argument that the lake was non-navigable in fact the rights of the shore owners would be practically the same, in the one case as above stated he takes to the center of the lake, and in the other to the water line, but with all the rights incident to riparian ownership of navigable waters.

*Hardin v. Jordan*, 140 U. S. 371.

*Lamprey v. State*, 52 Minn. 181.

The lake was properly meandered. Public surveys are conducted pursuant to specific rules and regulations prescribed by the government. Among which are the following: "You are also to meander in manner aforesaid, all lakes and deep ponds of the area of twenty-five acres and upwards; also navigable bayous, shallow ponds, readily to be drained or likely to dry up are not to be drained."

1 *Lester's L. L.* 714

Counsel says: "The apparent ease with which the so-called lake was drained shows that at most it was but a deep place in the swamp." To drain the lake it required a channel 70 feet wide at top and 40 feet at bottom and from 12 to 13 feet deep (R. 413). It further required the deepening and widening of Thief River, the outlet, which was done by the state (R. 417).

The lake had a natural outlet—Mud Creek—and yet it could not be drained through this outlet, but a ditch of the above size had to be constructed at a place where the country had the greatest fall (R. 415). The lake was less than two miles from Thief River.

We submit that there are very few of our lakes, even those classed as having deep waters, that could stand to be tapped with a channel of that kind. We are bound to have an occasional dry season, and conditions then existing are no more controlling than flood conditions would be during extreme wet seasons.

We have seen the Mississippi and the Minnesota

rivers practically dry, yet not one would contend that they are not public waters.

## II.

### The Limitations in Patents Issued Were of no Effect.

All the riparian lands were entered before the lake was drained. In filing on the same the entryman was entitled to a patent when he complied with the homestead requirements, without limitation or reservation in accordance with the homestead laws. Nowhere in the homestead laws is there a provision authorizing the general land office to limit the patents to the meander line.

The meander line is not a boundary line.

*Hardin v. Jordan,* above cited.

Many of the shore owners filed on and improved very small tracts on account of advantages of riparian rights.

The injustice of a limited patent may best be shown by considering the facts in connection with one of the patents in question, to-wit: John F. Tapper, Plaintiff's Exhibit "M" (R. 202). When Mr. Tapper filed on this land, Mud Lake was a subsisting body of water. As a homestead entryman, under the state law, he was the owner of the land to the water's edge, and had a right to follow the water as it receded. He erected substantial buildings near the lake shore. After the lake had been drained and the bed surveyed it was discov-

ered that Mr. Tapper had his buildings outside of the meander line. In making final proof an attempt was made to contest his rights on the ground that the improvements were not on the property filed on. The government, however, accepted the proof and issued a limited patent. If the limitation is upheld the result is that the improvements, which are quite substantial, are not on Mr. Tapper's land, but are on lands which the government is now trying to claim for the purpose of passing it on to someone else. Certainly the government does not want to be a party to anything of this kind. Using the language of counsel for appellant "there is but one way of reconciling the situation and that is to ignore the limitations that were inserted in some of the patents and accord riparian rights to all the patentees"—and this *can* be done without violence to the facts.

The testimony before us shows that all of the entries were made before the drainage of the lake, and hence our claim is that the entrymen and not the government were entitled to all of the benefits of the state law.

Has it come to this, that the government can question its own surveys whenever it deems it to be to its advantage to do so and under any flimsy excuse that it might assign? Here we have a survey made in 1892. The survey accurately shows the facts, and the survey is approved. Ten years later certain small islands are surveyed and again the surveyor reports that the depth of the waters varied from three to six feet. No claim of irregu-

larity in former survey is hinted at. A drainage survey by the government was made in 1906. This makes three distinct occasions when the government surveyors visited the lake on official business before it was drained.

Not a single man connected with any of these surveys was produced, but a sweeping attempt is made to disown its own work by the testimony of some settlers who were not even familiar with the lake in 1892, when it was surveyed.

No individual would dare to make such claim and expect the courts to give it consideration.

## III.

### The Indians Relinquished all Their Rights When Act of January 14, 1889, was Ratified.

The Indians are in no way interested in Mud Lake bottom. They relinquished their rights to the lake and all the land surrounding it. When these lands were ceded, Mud Lake was public water—and the bed belonged to the state.

The claim that the government rests under an obligation to deal with the reclaimed area in such wise as to realize for the Indians at least the stipulated price is absurd, and equally so the argument that the riparian owners are getting land that they never paid for.

We are considering property rights obtained from the state and these cannot be questioned by the United States.

We respectfully submit that the decisions of the

lower courts were correct, and that the decree appealed from should be affirmed.

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